

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
October 27, 2009 Session

**STATE OF TENNESSEE v. JEREMY BOYD**

**Appeal from the Circuit Court for McMinn County  
No. 05-578     Carroll L. Ross, Judge**

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**No. E2009-00973-CCA-R3-CD - Filed December 11, 2009**

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The Defendant, Jeremy Boyd, appeals the trial court's order revoking his probation for robbery and aggravated burglary, Class C felonies, and his probation revocation for reckless homicide, a Class D felony. The judgments of the trial court are reversed, and the case is remanded for a new revocation hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Reversed,  
Case Remanded.**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Randy G. Rogers, Athens, Tennessee, for the appellant, Jeremy Boyd.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Robert Steve Bebb, District Attorney General; and Paul Donald Rush, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The record reflects that the Defendant pled guilty to robbery and aggravated burglary. The trial court entered an order on September 5, 2006, placing him on judicial diversion and ordering him to complete two years of probation. A probation violation warrant was filed on June 30, 2008, alleging that the Defendant had been charged with reckless homicide<sup>1</sup> and was in violation of the probation requirement that he obey federal, state, and local laws. On February 2, 2009, the Defendant pled guilty to one count of reckless homicide and agreed to a four-year split confinement sentence consisting of six months in jail and three and one-half years of probation. The State recited to the court that the plea agreement included revocation of judicial diversion in the two previous cases, with five-year split confinement sentences in those cases of six months in jail and four and

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<sup>1</sup>The indictment charges the Defendant with one count of reckless vehicular homicide and one count of reckless homicide for the death of Alicia Smith on April 10, 2007.

one-half years of probation to be served concurrently with each other and with the reckless homicide sentence. The Defendant affirmed his agreement of the disposition of all cases. The court ordered that the Defendant begin serving his jail sentence on March 2, 2009, and entered judgments on all three cases. A probation violation warrant issued on March 6, 2009, alleging that the Defendant failed to report to serve his jail sentence on March 2, 2009, at 5:00 p.m.

The court conducted a hearing on the violation warrant. The attorneys for the parties recited factual premises, to which they said they stipulated, although no formal stipulation was read or submitted in writing. According to the facts recited, the Defendant failed to report to the jail on the appointed day and time; the Defendant did not realize he missed his time to report because he was confused about the correct date due to February having only twenty-eight days; the Defendant called his attorney the next morning to ask what he should do; and on the advice of counsel, the Defendant reported to the jail on March 3. The trial court noted that the Defendant had been given a “substantial break” when he was granted judicial diversion on a previous occasion, yet he “committed a rather horrible incident [the vehicular homicide].” The trial court found, “I just don’t think . . . you’ve proved yourself an amenable person to alternative sentences, based upon your past behavior, and I am going to revoke your probation and commit you to the Tennessee Department of Correction to serve the balance of your term. . . . I made it very clear that day what day he would turn himself in, and I’m not, quite frankly, I’m not persuaded by his argument he didn’t know how many days February had in it. I think he’s playing with the Court again; I think he played with the Court the last time he was here[.]”

On appeal, the Defendant argues that the trial court erred in revoking his probation and ordering him to serve his sentence in the Department of Correction. He argues alternatively that the court erred in revoking his probation because he was not yet on probation at the time he failed to report to serve his jail sentence because the sentence called for him to serve his jail time, followed by the probation component of the sentence. The State argues that there was no error.

The Defendant contends that he was not on probation in the time between entry of judgment on February 2 and his failure to report on March 2, and therefore, the court’s revocation was premature. Revocation when a defendant fails to report for jail service in a split confinement sentence is specifically authorized by Code section 40-35-307(e). The trial court’s actions were neither premature nor without authority.

The Defendant challenges the propriety of the revocation based upon the facts of the case. A trial court may revoke a suspended sentence upon its finding by a preponderance of the evidence that a violation of the conditions of release has occurred. T.C.A. § 40-35-311(e) (2006) (probation revocation). The judgment of the trial court in a revocation proceeding will not be disturbed on appeal unless it appears that there has been an abuse of discretion. See State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981).

In the present case, the Defendant had been given a reprieve for past crimes when he was granted judicial diversion. While on probation supervision pursuant to diversion, the Defendant committed vehicular homicide. Despite being allowed split confinement sentences as a consequence

of that crime and the revocation from judicial diversion probation, the Defendant failed to comply with a term of the new sentences, a fact he does not dispute.

The remaining questions are whether the trial court properly revoked the probation and acted within its discretion in ordering that the Defendant serve his entire sentences in the Department of Correction. The trial court based its decision on the Defendant's past behavior, its disbelief that the Defendant was mistaken about the correct date, and its belief that the Defendant "played with the Court" in a previous revocation proceeding. As a sanction for the Defendant's turning himself in less than twenty-four hours late, the court ordered that the Defendant serve his effective five-year sentence in the Department of Correction, whereas the original split confinement sentences required the Defendant to serve six months of the sentence in jail. It is not clear from the parties' informal statements whether they intended to stipulate as fact that the Defendant made an honest mistake about the correct date or whether they intended to stipulate that the Defendant's testimony would be that he made an honest mistake about the correct date. If the former, the trial court abused its discretion in finding the Defendant's claim of mistake incredible, because such a stipulation would remove its veracity from the realm of the trial court's consideration. If the latter, then we question the court's determination of the Defendant's credibility from a stipulation and not testimony. Under these circumstances, the trial court should not have ordered the Defendant to serve his entire five-year sentence in incarceration given the stipulated evidence that the Defendant called counsel the next morning to report his mistake and find out how to proceed, and that he surrendered himself to the jail authorities the day after he should have reported. We remand the case to the trial court for a new revocation hearing.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

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JOSEPH M. TIPTON, PRESIDING JUDGE